

1 **WO**

2
3
4
5
6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA
8

9 Seychelles Organics Inc.,) No. CV-11-1746-PHX-FJM
10 Plaintiff,) **ORDER**
11 vs.)
12)
13 John R. Rose,)
14 Defendant.)
15 _____)
16
17

18 Before the court is plaintiff's motion for an order to show cause (doc. 61), defendant
19 Rose's response (doc. 63), Julie Alcantar and AnuMed International's response (doc. 64),
20 plaintiff's replies (docs. 65, 66); plaintiff's renewed motion (doc. 67), defendant Rose's
21 response (doc. 69), Maria Esparza and Signature Formulations' objection and response (docs.
22 70, 71), and plaintiff's reply (doc. 72).

23 **I.**

24 The parties in this case have a long and tortured history. In November 2006, plaintiff
25 Seychelles Organics purchased the assets of several entities owned, managed, or serviced by
26 John Rose ("Rose Entities") for \$7 million. The Rose Entities formulated, manufactured,
27 marketed and sold creams, lotions, cosmetics, and nutritional supplements, including
28 progesterone-based products. As part of the asset purchase agreement, Rose executed a non-

1 compete agreement (“NCA”), promising not to participate, directly or indirectly, in any
2 business similar to the Rose Entities for a period of three years. The parties agreed that the
3 three-year period would begin to run following the termination of Rose’s employment with
4 Seychelles. Rose was terminated by Seychelles in August 2007, therefore the NCA was set
5 to expire no later than August 2010.

6 Seychelles claims that before the expiration of the NCA, Rose violated its terms by
7 providing services to AnuMed International in direct competition with the Rose Entities. In
8 August 2008, Seychelles filed a complaint in Utah state court seeking enforcement of the
9 NCA. In May 2009, the Utah court issued a preliminary injunction ordering Rose to comply
10 with the terms of the NCA. Nevertheless, Rose continued to violate the agreement. One day
11 before Rose was scheduled to appear to show cause as to why he should not be held in
12 contempt, Rose filed a bankruptcy petition in the District of Arizona. Seychelles responded
13 by filing an adversary proceeding in Rose’s bankruptcy case and a trade dress infringement
14 action in the United States District Court for the District of Utah.

15 In April 2011, following mediation, the parties executed a Settlement Agreement,
16 resolving all claims in each of the three actions. Seychelles agreed to dismiss the litigation
17 and withdraw its proof of claim. In exchange, Rose agreed to the immediate entry of
18 judgment against him in the amount of \$1 million, as well as the entry of a permanent
19 injunction, prohibiting him from participating in any business in competition with the Rose
20 Entities for a period of 25 years from the settlement date. Specifically, the injunction broadly
21 prohibits Rose, and any of his agents, employees, or affiliates, or anyone with whom he
22 consults, “from producing, marketing, selling or distributing any product in any form
23 containing any one or more of the following hormones: (i) Progesterone; (ii) Testosterone;
24 (iii) Estrodial; (iv) Estriol; (v) Pregnenolone.” (Doc. 1, ex. A, ¶ 4(a)).

25 As part of the Settlement Agreement, Seychelles agreed to forbear taking action to
26 collect on the \$1 million judgment so long as Rose timely complied with his obligation to pay
27 \$180,000 over a 5-year period and “remain[ed] in compliance with the terms of the
28 injunction.” Id. ¶ 6.

1 The bankruptcy court approved the Settlement Agreement and issued proposed
2 findings of fact and conclusions of law. We adopted the bankruptcy court's findings and
3 conclusions and granted the parties' stipulated motion for entry of final judgment and
4 permanent injunction ("Stipulated Judgment") (doc. 6), which incorporated the terms of the
5 Settlement Agreement.

6 In 2013, Seychelles filed a motion to reopen this case, contending that Rose defaulted
7 on his payment obligations under the Settlement Agreement and continued to violate the
8 terms of the NCA. Seychelles notified Rose of the termination of its forbearance obligation
9 and began efforts to collect on the \$1 million Stipulated Judgment.

10 On January 15, 2013, AnuMed filed a separate action against Seychelles seeking a
11 declaration that AnuMed was not a party to the Settlement Agreement and not bound by its
12 terms. AnuMed Int'l, LLC v. Seychelles Organics, Inc., No. CV-13-0098-PHX-MHB (D.
13 Ariz. Jan. 15, 2013) (Burns Case). Rose subsequently joined as a party plaintiff. AnuMed's
14 complaint has been dismissed and all that remains of the Burns Case is Rose's claim seeking
15 a declaration that the \$1 million Judgment "is so grossly excessive" that it constitutes an
16 "unenforceable penalty." Burns Case, Amended Compl. (doc. 13, ¶ 41).

17 In July 2014, Rose filed a motion in our case seeking to set aside the \$1 million
18 judgment pursuant to Rule 60(b), Fed. R. Civ. P., arguing that the Stipulated Judgment is
19 void, unconscionable, or that applying it prospectively is no longer equitable—in each
20 instance challenging the enforceability of the \$1 million Judgment. We denied the motion,
21 concluding that Rose failed to establish the "extraordinary circumstances" required to support
22 setting aside a judgment under Rule 60(b). (Doc. 60).

23 In the most recent chapter in this saga, Seychelles has moved for an order requiring
24 Rose to show cause as to why he should not be held in contempt for his violation of the 25-
25 year non-compete clause contained in the Settlement Agreement and Stipulated Judgment.
26 He contends that Rose continues to violate the terms of the NCA because of his relationship
27 with Maria Esparza and her company, Signature Formulations. Now called upon to enforce
28 the 25-year NCA, we must first consider its legal validity.

II.

Under Arizona law, covenants not to compete that are ancillary to contracts for employment or sale of a business will be enforced only where they are reasonably limited as to time and geography. “When a business is sold, the value of that business’s goodwill usually figures significantly into the purchase price. The buyer therefore deserves some protection from competition from the former owner.” Valley Med. Specialists v. Farber, 194 Ariz. 363, 368, 982 P.2d 1277, 1282 (1999). However, the scope of a covenant must be no greater than necessary to protect the legitimate business interests of the party seeking enforcement. Id. at 370, 982 P.2d at 1284. “To be enforced, the restriction must do more than simply prohibit fair competition by the employee.” Id. at 367, 982 P.2d at 1281. “The test of validity of restrictive covenants is one of reasonableness.” Olliver/Pilcher Ins. v. Daniels, 148 Ariz. 530, 532, 715 P.2d 1218, 1220 (1986).

By any standard, the NCA in the Settlement Agreement, as adopted by the Stipulated Judgment, is unreasonable in both its duration and geographic scope. Arizona law permits only those restrictive covenants that are reasonably limited as to time and territory. A 25-year, worldwide restriction¹ provides no limitation as to either duration or geography, and accordingly constitutes an unreasonable restraint of trade. Recall that the original NCA in connection with the asset purchase agreement limited the restrictive covenant to three years, an arguably reasonable term. However, the duration was expanded to 25 years as part of the parties’ Settlement Agreement. Neither punishment for prior NCA violations, nor a lifelong prohibition of competition serves as a legitimate business purpose to support this unreasonable NCA.

III.

Generally, courts do not rewrite contracts for parties. Id. at 533, 715 P.2d at 1221. However, “[i]f it is clear from its terms that a contract was intended to be severable, the court

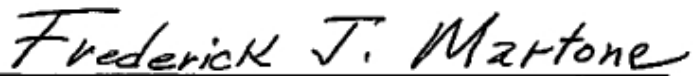
¹In addition to markets in the United States, Seychelles seeks to enjoin any action by Rose to sell in a Vietnamese market (doc. 61-1, ex. K at 104), a Mexican market, (doc. 61-1, ex. L at 106), and a Norwegian market (doc. 61-1, ex. C at 120).

1 can enforce the lawful part and ignore the unlawful part.” Id. “Arizona courts will ‘blue
2 pencil’ restrictive covenants, eliminating grammatically severable, unreasonable provisions.”
3 Farber, 194 Ariz. at 372, 982 P.2d at 1286. Here, the Settlement Agreement contains an
4 enforceability clause whereby the parties agreed that in the event any clause is ruled legally
5 unenforceable, the remaining portions of the Agreement will remain in full force and effect.
6 (Doc. 1, ex. A, ¶ 15). We conclude that paragraphs (a), (b), (e) and (f) of the Settlement
7 Agreement (doc. 1 at 15) and the Stipulated Judgment (doc. 6 at 2) are invalid and legally
8 unenforceable.²

9 **IV.**

10 **IT IS ORDERED DENYING** Seychelles’ motion for an order to show cause (doc.
11 61) and **DENYING** Seychelles’ renewed motion (doc. 67).

12 DATED this 27th day of March, 2015.

13
14 

15 Frederick J. Martone
16 Senior United States District Judge
17
18
19
20
21
22
23
24
25

26
27 ²This holding does not affect that portion of the permanent injunction prohibiting Rose
28 from infringing on Seychelles’ trade dress, trademarks or logos contained in paragraphs (c)
and (d).